DOCUMENT RESUME

ED 256 840 UD 024 211

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TITLE	Statement of Commissioner, Immigration and Naturalization Service, before the Committee on the Judiciary, Subcommittee on Immigration and Refugee Policy, United States Senate, concerning S. 377.
INSTITUTION	Congress of the U.S., Washington, D.C. Senate Committee on the Judiciary.
PUB DATE	22 Apr 85
NOTE	14p.
PUB TYPE	Viewpoints (120)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	*Federal Legislation; Foreign Countries; Foreign Nationals; Immigrants; *Latin Americans; Public Policy; Refugees; *Undocumented Immigrants
IDENTIFIERS	*El Salvador; Immigration and Naturalization Service; Immigration Legislation; *Reagan Administration; Refugee Act 1980

ABSTRACT

The Reagan Administration opposes proposed legislation (Senate 377) that would provide special assistance, including temporary stays of deportation, for El Salvadoran nationals illegally in the United States. First, such legislation will accomplish nothing that cannot be done better or more equitably under the Refugee Act of 1980, which established a comprehensive system under which any person, regardless of origin, can apply for and receive individual consideration of the merits of his or her claim to asylum or refugee status. Senate (S) 377 would circumvent the basic policy behind the 1980 Act and return to the ad hoc and discriminatory approach of the past. As for claims that S. 377 would eliminate discriminatory Immigration and Naturalization Service (INS) policy against Salvadoran asylum applicants, any such claims must be challenged. There is no discrimination against Salvadorans. Asylum applications that demonstrate a well-founded fear of persecution are granted. Those that are poorly documented or patently frivolous are not. A second reason for the Administration's opposition to S. 377 is that it will undermine enforcement of the Immigration and Nationality Act. It will have a magnet effect, encouraging high levels of continuing illegal entry from Central America. It is unlikely that after expiration of the temporary stays, the Salvadorans will return home voluntarily or the INS will be able to locate and remove them. Thus, the Senate should consider S. 377 in the total immigration context and not support it. (KH)

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ED256840

Department of Justice

MAY 6 1985

STATEMENT

OF

ALAN C. NELSON
COMMISSIONER
IMMIGRATION AND NATURALIZATION SERVICE

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY
UNITED STATES SENATE

CONCERNING

S. 377

ON

APRIL 22, 1985

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UD024211

Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to comment on S. 377 which you are considering today. The Administration believes that the bill not only is unnecessary, but also that it fundamentally undermines the comprehensive and orderly system created by the Refugee Act of 1980 as well as this nation's entire immigration system covered by the Immigration and Nationality Act.

The Administration is opposed to this bill because it proposes an inequitable solution to a problem that does not exist. If the purpose of the bill is to protect El Salvadoran nationals from random or war-related violence in their country, it fails: the bill only proposes to offer refuge to those who are here and it ignores nationals of other violence affected countries.

In short, the bill accomplishes nothing that cannot better and more equitably be done under the existing Refugee Act of 1980. In this context, I would like to focus on two issues. The first concerns the reasons why the Refugee Act of 1980 should not be circumvented by this bill. The second concerns the procedures for handling asylum claims from aliens in the United States -- whether they walk in and file an application with a district director or have been apprehended and are filing with an immigration judge.

Reversing the Intent of the Refugee Act

This bill would establish extraordinary and unique procedures for handling nationals of El Salvador in the United States without regard to their reasons for entry into the United States, and in contrast to existing law and policy which are intended to treat aliens of all nationalities in a similar fashion. Congress passed the Refugee Act of 1980 to supplant the piecemeal and nation-specific legislation and parole programs under which refugees had been admitted to the United States. The stated objective of the Refugee Act was "to provide a pertinent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States. . . ." It set up a system under which any person--regardless of origin--can apply for and receive individual consideration of the merits of his or her claim to asylum or refugee status.

S. 377 proposes to circumvent this system, established by the Refugee Act only five years ago, and return to the ad hoc and discriminatory approach of the past. Title III of this bill would prohibit the Attorney General from detaining or deporting virtually all nationals of El Salvador who are present in or, as a practical matter, who enter the United States during the next two years. In essence, it would create a class of virtually every Salvadoran who can manage to enter the United States and, regardless of whether the individual has a legitimate claim of persecution, would provide a period of approximately two years during which members of this class could remain in the United States. This raises the prospect of a stream of Salvadorans illicitly entering the United States under the effective sanction of this legislation. In

effect, Congress would be encouraging Salvadorans to enter the United States by the hundreds of thousands in any manner possible to take advantage of the provisions of this bill.

Let me now review the legislative history of the Refugee Act of 1980. The United States became a signatory to the United Nations Protocol Relating to the Status of Refugees in 1968. In ratifying the Protocol, the Senate made it clear that it believed that the Protocol was consistent with existing U.S. immigration laws. But the Protocol was not self-executing. That is, while the United States had undertaken international treaty obligations, those obligations were not enforceable in the U.S. courts without the passage of domestic legislation.

The Refugee Act of 1980 was that implementing domestic statute. In passing this legislation, the 96th Congress intended to provide the sole vehicle for meeting U.S. humanitarian obligations relating to victims of persecution. As stated in the Senate Report to the Senate version of the bill:

> The Refugee Act of 1979 establishes for the first time a comprehensive United States refugee resettlement and assistance policy. It reflects one of the oldest themes in America's history -- welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns.... And it places into law what we do for refugees now by custom and on an ad hoc basis. S. Rep. No. 96-256 (1979) at 1. (Emphasis added.)

Note the last phrase. A major purpose of Congress in passing this Act was to get away from nation-specific refugee legislation. The concept was to remove from the Executive Branch discretion to use the parole power

to bring in large groups of refugees on an ad hoc basis, we well as to eliminate Congressional debate over special refugee legislation for various national groups.

Former Secretary of State Cyrus Vance and Congressman Peter Rodino, Chairman of the Committee on the Judiciary, both emphasized that the bill was meant to address all refugee situations, emergency and otherwise. Both characterized the legislation as "comprehensive" and pointed out, "... the necessity for enacting coherent legislation to meet future and continuing refugee emergencies."

As to who was covered by the legislation, the Conference Committee was crystal clear that while the legislation would incorporate "the internationally-accepted definition of refugee contained in the U.N. Convention and Protocol Relating to the Status of Refugees ... as well as Presidentially specified persons within their own country who are being persecuted or who fear persecution." However, persons who themselves had engaged in persecution as well as those fleeing military or civil disturbances were excluded from the definition.

In summary, there are several conclusions that may be drawn from the legislative history and the language of the Refugee Act of 1980. First, the U.N. Protocol was implemented by the Refugee Act of 1980. The Refugee Act was designed to be the only implementing instrument. Second, the Refugee Act was intended to be the comprehensive method by which the United States would respond to all refugee-producing situations. Third, the Refugee Act was meant to apply to all persons who might be termed

"refugees" under domestic law and regulation and to meet the human rights and humanitarian obligations of the United States to such persons. Fourth, the Conference definition of "refugee" specifically excluded the language of the Senate version which would have encompassed displaced persons.

The Refugee Act of 1980 also contains the sole basis for the United States to meet its obligation of "non-refoulement" of refugees under the U.N. Protocol. In addition to giving a statutory basis for asylum, the Refugee Act amended section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), for this express purpose.

Given this fact, it is simply untenable to assert, as some persons have done, that El Salvadoran nationals in the United States may claim a basis under any other international agreement or human rights law to enter and remain in the United States. Such an assertion flies directly in the face of Congressional intent to establish a comprehensive refugee policy, to assist refugees of special concern, and to meet international obligations relating to "non-refoulement" by means of the Refugee Act of 1980.

Asylum Adjudication

Some proponents of this bill have claimed that a purported discriminatory policy against Salvadoran asylum applicants is a key reason why a special temporary stay of deportation provision must be enacted for Salvadorans. Asylum regulations issued in accordance with the Refugee Act of 1980 provide common procedures for handling asylum requests regardless of nationality and with only minimal differences if the alien files with the district director or presents his claim to an immigration judge. In

the former case, he or she is interviewed by an immigration examiner and then the asylum application is sent to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State for an advisory opinion. After the advisory opinion is received, the file is reviewed and a determination is made in the case. If the district director denies the application, the alien may renew the claim in proceedings before an immigration judge.

In the case of an alien who is being held for exclusion or deportation proceedings, the process is basically the same. First, the hearing will be recessed to permit the alien time to submit an asylum application. Second, if the alien is being detained his or her bond can be lowered based on facts presented at the redetermination hearing which were unavailable to the INS district director when he set the original bond. Third, the application will be sent off to BHRHA. After the BHRHA advisory opinion is received, the immigration judge conducts a full, due process hearing with fact finding under oath at the end of which he issues a decision on the application. The applicant may have counsel and may present evidence and testimony at such hearing.

The Administration has been accused of having made a deliberate policy decision to deny applications from nationals of friendly Central American governments. The administrative process makes the function of the immigration judges separate from that of the INS and its district directors; the State Department's function is separate from both; the reviewing administrative panel, the Board of Immigration Appeals (BIA), is bound by its own precedents which apply to all nationalities; and the U.S. Courts of Appeal, which review the BIA decisions, unquestionably are not part of the

Administration. To give any credence to the deliberate policy theory, you have to believe that there is an organized conspiracy, joined by many employees of these separate organizations specifically to deny asylum to El Salvadorans. In sum, it is not our policy to deny legitimate applicants this important protection.

The assertion that the INS denies all Salvadoran applications for asylum simply isn't true. We grant the ones which demonstrate a well-founded fear of persecution. Last year we granted over 300 at the district director level. Over 500 individuals were covered by such grants. More were approved by immigration judges.

Why are so many denied? As a matter of fact many applications for asylum by El Salvadorans are not merely poorly documented, they are often patently frivolous on their face. What does a district director or an immigration judge do with an application such as this one:

-- The page requesting information detailing the reasons for the application essentially is blank, but for the response to the question, "If you return to your country, for what specific reasons do you believe you will be persecuted?" The applicant didn't check "race"; nor "religion"; nor "nationality"; nor "political opinion"; nor "membership in a particular social group"; she checked "other." And what was the "other" reason? She believes she will be persecuted "because of the war." The Refugee Act of 1980 was not designed to provide relief for this kind of situation.

-- In response to the question, "What do you think would happen to you if you return?" She answered: "Nothing. I would go home."

-- The addendum to this I-589 is equally revealing. She left El Salvador, "Because of the war" traveling to the U.S. through Guatemala and Mexico "to see my uncle." She didn't apply for asylum in either of those other countries, "Because I don't like Mexico or Guatemala."

Based on the information provided by this applicant, should she be granted asylum? There are quite literally hundreds of such applications. All these applicants are interviewed by an immigration officer and get full asylum hearings before an immigration judge. All have a right to appeal an adverse decision to the BIA. They may further appeal to the federal courts. No other country in the world provides so elaborate a series of procedural safeguards to ensure that individuals who fear persecution are not returned to nations where they would be harmed.

Our system provides so many procedural safeguards that over 71% of El Salvadoran nationals apprehended in Fiscal Years 1982, 1983, and 1984 are still in the legal process. That's over 35,000 people. The inescapable conclusion to be drawn from the frivolousness of many of the applications is that the asylum process is being abused by people who have no valid claims under U.S. law but who wish for other reasons -- perhaps economic -- to remain here for a period of time.

Adverse Consequences of the Bill

S. 377 and its House counterpart H.R. 822 seek to accomplish two worthy objects: to study the fate of returnees to Central American and to assist El Salvadoran nationals illegally in the United States. But while we can sympathize with the sentiment behind these proposals, the legislation itself would accomplish little that has not already been done and it would vitiate the entire purpose of the Refugee Act. Further, it will seriously hamper enforcement of the Immigration and Nationality Act.

While we would welcome any new study by the Government Accounting Office, or other entity, studies such as those called for by S. 377 previously have been done. Surveys of refugee camps and returnees are going on all the time. The U.N. High Commissioner for Refugees has just completed a tour of Mexican refugee camps. Other non-governmental organizations have conducted surveys of returning Salvadorans. The results of these studies have been the same each time: (1) the people in the refugee camps primarily are displaced persons; and (2) Salvadoran returnees are not persecuted or harmed because they have been expelled from the United States.

The temporary stay of deportation for Salvadorans, called for in Title III of the bill, simply is unnecessary. No one is forcibly returned to El Salvador -- or any other place -- who has not had a full and fair opportunity to exercise his or her full due process rights under the 14th Amendment.

A serious concern is that by granting these temporary stays of deportation, the historic flow of migrants from Central America will be swelled by even more persons seeking economic betterment. Plainly said: If a Salvadoran

migrant can find his way to the United States, as tens of thousands of Central Americans do each year, S. 377 will allow him to stay, sink roots, and find other means to "normalize" his immigration status. This will make more difficult our efforts to control illegal entry along our Southern border and establish trends which may lead to an invasion of "feet people" magnifying the migration from that region making what we already see as a stream become a torrent. Although the bill applies only to Salvadorans in the United States at the time of enactment, it will be impossible to preclude later entrants who assert that they were here prior to the effective date.

INS apprehensions of Salvadoran nationals increased more than 100 percent from 1978 to 1984, from 8,968 to 18,920. Proponents of this bill argue that these figures evidence the flight from persecution or violence. However, there was no significant jump in 1979 and 1980 immediately after the 1979 changes in government and the period of greatest civil disorder in El Salvador. Instead the largest number of illegal Salvadorans have been arrested this past year, when by all accounts the government of El Salvador has been in greater control of the country and the number of human rights violations has decreased significantly.

A second question in this regard: Is this "temporary safe haven" really temporary? Once here, how many of the Salvadorans are likely to go home? Instead of returning to El Salvador once the violence subsides, it is probable that these beneficiaries of temporary stays of deportation will take the route of other migrants before them and maintain their resettlement here in the United States. It would be nearly impossible to

locate and remove the estimated 300,000 to 500,000 illegal Salvadoran aliens after the temporary stays expired.

The Refugee Act of 1980 created a system under which all national groups would be treated equally and fairly. To stay deportation for El Salvadorans while compelling other nationalities to return to similar unsettled conditions is fundamentally unfair.

I have approached this subject from the ground up because I believe that it is important for this Subcommittee to understand that the system created by the Refugee Act of 1980 is in place and works. It is folly to return to the old system, which was abandoned by the will and wisdom of Congress a short five years ago for sound reasons which remain true today.

To summarize -- It would be contrary to the intent of Congress in establishing the Refugee Act of 1980 to turn away from the concept of "nationality specific" enforcement of our immigration laws. We have a fair and workable system of asylum. Instead of establishing a special system of temporary stays of deportation for Salvadorans, those elected representatives and the segments of this society that support this legislation should redouble their efforts to make the current system work.

The Administration believes that the current system works if only the applicants will use it. This committee should consider this bill in the immigration context and not support S. 377, which is ill conceived and will certainly have a "magnet" effect, encouraging high levels of continuing illegal entry by people from Central America.

On behalf of the Administration, I urge you not to support S. 377.

I would be happy to address any question from the Committee.

DOJ-1985-04